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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 661.

JOSEPHINE HUGHES URBAN,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

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In Opposition to Petition for Writ of Certiorari.

THIS CASE RAISES NO JURISDICTIONAL QUESTIONS REVIEWABLE UNDER 28 U. S. C., § 1257 (3).

As hereinafter noted, there is no right, privilege, or immunity here involved or claimed under the Constitution or Statutes of the United States which could conceivably confer jurisdiction under 28 U. S. C., § 1257 (3).

QUESTIONS INVOLVED.

At the outset it should be noted and remembered that the constitutional validity of no state statute or procedure is here questioned. Other respondents to this condemnation case who were parties to the proceedings in the Circuit Court were not summoned to appear in the Alabama Supreme Court in the manner provided by Title 7, § 804, of the **1958 Recompiled Code of Alabama** (Code) and the then (second) attorney for the petitioner admittedly did not request that they be so notified. Their failure to be notified was made the basis of the motion of the State of Alabama to dismiss. The suggestion that petitioner had "a constitutional right" to have the other respondents notified, without any request therefor, was not raised by petitioner on her appeal or in her application for rehearing. Accordingly, the basic questions involved are:

(1) Will the Supreme Court of the United States undertake to review proceedings in the state court which were not presented to that court on original submission and brief or on application for rehearing where the well-established uniform rule in the state is that:

> Questions cannot be raised on rehearing where no argument touching it was made in brief upon original submission of appeal.

(2) Is a substantial federal questions presented where the state supreme court denied an application to restore a case to its **rehearing** docket filed almost six months **after** an application for **rehearing** had been denied and where no constitutional questions were raised on original submission or on rehearing?

STATEMENT OF THE CASE.

This is a condemnation (eminent domain) case, filed by the State of Alabama (State) against named respondents, of which petitioner was one, to acquire the property rights therein described for public highway purposes. After hearing in the Probate Court of Etowah County, Alabama, as provided by Chapter 1, Title 19, **Code**, the State appealed to the Circuit Court and demanded a jury trial. All respondents were served with notice of the appeal. The case tried before then Circuit Judge (now United States District Judge for the Southern District of Alabama) Hon. Virgil Pittman, consumed five trial days including a jury view of the property, following which the jury returned its verdict fixing the damages and just compensation to which the respondents were entitled. The order of condemnation was entered on this verdict by the trial court on December 12, 1960. The then attorneys for all respondents filed a motion for a new trial which was overruled and denied by the trial judge. On June 2, 1961, the present petitioner, being only one of the respondents, through her (2nd) attorneys, filed a notice of appeal and security for costs from the Circuit Court of Etowah County to the Supreme Court of Alabama. 17 separate orders were entered by the trial court, at the request of the petitioner, extending the time for filing the transcript with the Alabama Supreme Court. The petitioner owned only an undivided part interest in the property sought to be acquired. Admittedly, "the other persons interested in the tract of land who were parties to the proceedings in the Circuit Court" were not made parties to or given notice of the purported appeal to the Alabama Supreme Court.[1] The State moved that

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1 From aught that appears in the record, all the other respondents were satisfied with the award and did not desire their funds to be held up pending consideration and disposition of the appeal by one of several respondents who holds only an undivided part interest in the property.

the appeal be dismissed on the ground, among others, that "no notice or citation had been served on any of the other party respondents (landowners) as required by Title 7, § 804, **Code.**" On November 18, 1965, the Alabama Supreme Court rendered a unanimous opinion that the appeal should be dismissed "for want of proper parties." **Urban v. State,** 7 Div. 566—Alabama—(not yet reported in Alabama Reports), 180 So. 2d 910.[2] The (second) attorney for the petitioner then filed an application for rehearing in the Alabama Supreme Court which was denied on December 16, 1965.[3]

On June 5, 1966, present (the third) attorneys for the petitioner filed a motion with the Alabama Supreme Court to restore the case to the rehearing docket and for further consideration.[4] This motion admittedly presented "for the first time" the questions now sought to be reviewed which were not briefed or argued on the original submission to the Alabama Supreme Court or on rehearing. This motion was denied by order of the Alabama Supreme Court on June 13, 1966, and it is that order the petitioner now seeks to review.

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2 This decision is set out as Appendix B, pp. 10-14, to the Petition in this cause.

3 Copy of the Order of the Alabama Supreme Court denying the application for rehearing is set out in the Petition for Certiorari, p. 17. The Petition for Rehearing is set out on page 16.

4 This was not a motion for rehearing as petitioner erroneously suggested (Petition, p. 2) but, as subsequently noted by petitioner (p. 17) it was a "Motion to restore the case to the rehearing docket and for further reconsideration". The petition for rehearing under Alabama Supreme Court Rule 34 had been submitted and denied on December 16, 1965, almost 6 months before the motion was filed.

REASONS FOR DENYING THE WRIT.

The petitioner's appeal to the Alabama Supreme Court from the order of condemnation entered in the Circuit Court of Etowah County, Alabama, was dismissed by the Alabama Supreme Court "for want of proper parties" on submission. The Alabama Supreme Court simply applied an act approved April 21, 1911 (Alabama General Acts, 1911, p. 589), contained in each Code since that date, and most recently codified as Title 7, § 804, Code.

It is apparent that no federal question is here involved. Assuming, arguendo, that a federal question is involved (which respondent denies) then it was not raised before or presented to the Alabama Supreme Court by petitioner. It is fundamental that before this Court will grant certiorari to review a decision of the State Supreme Court it must affirmatively appear that a federal question exists and that it was presented to the State Supreme Court and that its decision of the federal question was necessary to its determination of the cause. None of these requirements are here present. The general rule was stated by this Court in **Durley v. Mayo**, 351 U. S. 277, cert. den. 352 U. S. 859, as follows:

> "It is a well established principle of this Court that before we will review a decision of a State Court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to determination of the cause. **Honeyman v. Hanan**, 300 U. S. 14, 18; **Lynch v. New York**, 293 U. S. 52, and where the decision of the State Court might have been either on a State ground or on a Federal ground and the State ground is sufficient to sustain the judgment, the Court will not undertake to review it."

Following the decision of the Alabama Supreme Court here complained of, the petitioner filed a petition for rehearing with that Court but did not raise or suggest any Federal questions in that petition. As noted, the petition was overruled by the Alabama Supreme Court on December 16, 1965.

With commendable candor, counsel for petitioner here confesses that:

> "The constitutional questions raised by this petition, were not raised in response to the motion of the appellee, the State of Alabama, to dismiss the appeal, and **unfortunately** were not raised on the appellant's application for a rehearing." (Emphasis ours.)

No authorities in point are cited by petitioner to sustain its untenable position. All the cases cited by them relate to the proposition that:

> "A state, having an appellate system in criminal cases, is constitutionally required to provide means of affording adequate and effective review to indigent defendants to the end that they may be placed upon a basis of equality in respect with non-indigents."

The situation here presented is a far cry from that principle.

If there was any constitutional question here involved (which we deny), then it should have been presented to the Alabama Supreme Court on submission. It is a well-established, fundamental, uniform rule in Alabama that:

> "An application for rehearing based on grounds not argued or suggested until after the Supreme Court's judgment will not be considered."

See Alabama Digest, **Appeal & Error**, Key 832 (4) and cases cited; **Robinson v. Allison**, 97 Ala. 596, 12 So. 604;

Goodgame v. Dawson, 242 Ala. 499, 7 So. 2d 77; **Rudolph v. Rudolph**, 251 Ala. 317, 36 So. 2d 902.

The petitioner's contention is not well taken, had it been duly presented. The Alabama Supreme Court uniformly has held that failure to comply with Title 7, § 804, *supra*, will result in dismissal of the appeal either on motion of appellee or ex moro motu. **Warren v. Georgia Fire Insurance Co.**, 10 Ala. App. 650, 65 So. 843; **Benefield v. Benefield**, 25 Ala. App. 568, 150 So. 711; **Matthews v. Donald**, 263 Ala. 575, 83 So. 2d 291; **McKinstry v. Thomas**, 258 Ala. 690, 64 So. 2d 808; **Rush v. Newsom Exterminators**, 261 Ala. 610, 75 So. 2d 112.

If the other parties respondent in the Circuit Court had desired to participate in the appeal (and obviously they did not), they could have (1) joined in the appeal, or (2) voluntarily appeared in the Supreme Court and adopted the assignments of alleged errors, or (3) the notice required by § 84, Title 7 could have been waived by their attorney. They did neither. Where they did not join in or appeal, the uniform decisions of the Alabama Supreme Court, previously noted, required and compelled dismissal.

The only question involved or presented to the Alabama Supreme Court on rehearing was that (Petition, p. 16):

> "§ 23, Title 19, Code of Alabama, 1940, is the only method by which a party may appeal from an order of the Circuit Court of condemnation."

The Alabama Supreme Court rendered no formal opinion in overruling Petitioner's application for rehearing. As noted in **Durley v. Mayo**, 351 U. S. 288, cert. den. 352 U. S. 859:

> "Where the highest Court of the state delivers no opinion and it appears that the judgment might have

rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment."

Thus, in the case here pending:

—There is no federal question involved that could conceivably confer jurisdiction under 28 U. S. C. 1257 (3).

—No federal question was presented or suggested to the Supreme Court of Alabama although the petitioner had the opportunity to do so in its application for rehearing.

—A decision on no federal question was necessary or pertinent to a proper determination of the proceedings by the Alabama Supreme Court.

—It affirmatively appears that the Alabama Supreme Court simply applied a long established uniform rule and statute.

The Alabama Supreme Court rendered the only decision it could under the admitted facts.

Respectfully submitted,

STATE OF ALABAMA,

Richmond M. Flowers

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Maurice F. Bishop

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Certificate of Service.

I hereby certify that I have served a copy of the foregoing brief in opposition to the Petition for Certitorari on Hon. Reid B. Barnes as counsel of record for the petitioner by personally delivering a copy of same to him on this 16 day of November, 1966.

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